ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

The Cheyenne River Sioux Tribe Telephone Authority's and U S WEST COMMUNICATIONS, INC.'s Joint Petition for Expedited Ruling Preempting South Dakota Law	)))))	**CC DOCKET NO. 98-6**

JOINT REPLY OF THE CHEYENNE RIVER SIOUX TRIBE TELEPHONE AUTHORITY AND U S WEST COMMUNICATIONS, INC. TO THE COMMENTS OF THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION OPPOSING THE JOINT PETITION FOR PREEMPTION

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I. INTRODUCTION

The Cheyenne River Sioux Tribe Telephone Authority ("Telephone Authority") and U S WEST COMMUNICATIONS, INC. ("U S WEST") file this joint reply to the *Comments of the South Dakota Public Utilities Commission Opposing the Joint Petition of the Cheyenne River Sioux Tribe Telephone Authority and U S WEST COMMUNICATIONS, INC. for an Expedited Ruling Preempting South Dakota Law* (Feb. 26, 1998) ("SDPUC Response"). The SDPUC's Response does not provide a rationale for dismissal of the Telephone Authority's and U S WEST's joint petition for preemption, and therefore the Commission should reject the SDPUC's Response.

The SDPUC has failed to answer the question whether its application of S.D. Codified Laws § 49-31-59 ("SDCL § 49-31-59") to deny the Telephone Authority the opportunity to purchase the Morristown, McIntosh and Timber Lake telephone exchanges from U S WEST constitutes a barrier to entry to Indian tribes and tribal entities in the telecommunications field. Instead, the SDPUC has focused on whether the sales would increase competition in the exchanges. Because 47 U.S.C. § 253(a) does not address the issue of competition, but rather

addresses only whether a state's application of its laws erects a barrier to entry, the Telephone Authority and U S WEST respectfully request that the Commission reject the SDPUC's Comments and grant their joint petition for preemption of the SDPUC's application of its laws.

II. THE SDPUC'S ARGUMENTS OPPOSING THE PREEMPTION PETITION DO NOT WARRANT DISMISSAL OF THE PETITION

A. THE SDPUC IGNORES THE PLAIN LANGUAGE OF SECTION 253.

The SDPUC spends much of its response arguing that the telephone exchange sales to the Telephone Authority will not advance competition in the provision of telecommunications services in South Dakota because the Telephone Authority will merely replace U S WEST as the sole provider of telecommunications services in the Morristown, McIntosh and Timber Lake exchanges. SDPUC Response at 11. According to the SDPUC, "the scope of this inquiry is whether SDCL 49-31-59 has an adverse impact on competition." Id. at 2. This assertion misstates § 253(a) and does not bear on the question whether the SDPUC's application of SDCL § 49-31-59 to prohibit the exchange sales to the Telephone Authority constitutes a barrier to entry.

1. The Term "Competition" Does Not Appear in the Plain Language of § 253 of the Communications Act.

The Communications Act provides that, "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). As the SDPUC has acknowledged, the Commission must "'first determine whether the

challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone.'" SDPUC Response at 10 (quoting Public Utility Commission of Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulation Act of 1995, CCBPol 96-13, FCC 97-346 ¶ 42 (1997)).

Nowhere in the express terms of § 253(a) does the word "competition" appear. Indeed, § 253 is limited to the issue whether a state or local government has erected a barrier to entry into the telecommunications field. Public Utility Commission of Texas, ¶ 41 ("Congress enacted section 253 to ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition. . . . [T]his mandate requires us to preempt not only express restrictions on entry, but also restrictions that indirectly produce that result."). The question is whether barriers erected by the state "unreasonably deter competitive entry . . . ." Id. ¶ 68. The SDPUC's attempt to couch § 253 in terms of competition as a condition precedent for preemption fails in light of the plain language of the statute.

2. The Sale of Telephone Exchanges Itself is a Competitive Act and Does Not Reinforce Monopolistic Behavior.

Disregarding the plain language of § 253 of the Communications Act, the SDPUC strenuously argues that the Commission should not preempt its application of SDCL § 49-31-59 to prohibit the Telephone Authority from purchasing the Morristown, McIntosh and Timber Lake exchanges from U S WEST because the sales would not promote competition. SDPUC Response at 9. According to the SDPUC, the sales would merely be a transfer from one monopolist to

another. Id. at 11.

In the first place, the Telephone Authority is not a monopolist by design; it, like U S WEST, is a sole provider in South Dakota because of the rural nature of the geographic areas it serves. In the second place, the SDPUC's argument directly contravenes settled law holding that the sale of a business is in itself competition.

In United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990), the United States brought an action against Syufy alleging antitrust violations in purchasing a number of movie theaters from competitors resulting in a monopoly on movie theaters in Las Vegas by Syufy. The United States asserted "that 'you may not get monopoly power by buying out your competitors.'" Id. at 662. The Ninth Circuit rejected this argument. "There is universal agreement that monopoly power is the power to exclude competition or control prices." Id. at 664 (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); Syufy Enters. v. American Multicinema, Inc., 793 F.2d 990, 993 (9th Cir. 1986), cert. denied, 479 U.S. 1031 (1987)). While Syufy "temporarily diminished the number of competitors in the Las Vegas first-run film market," id., the movie theater purchases did not rise to monopolistic levels because the lack of barriers to entry into the movie theater business prevented "any attempt to raise prices above the competitive level [which would] lure into the market new competitors able and willing to offer their commercial goods or personal services for less." Id. (citing Metro Mobile CTS, Inc. v. New Vector Commun., Inc., 892 F.2d 62, 63 (9th Cir. 1989)). That is in fact what happened: after Syufy acquired all movie theaters in Las Vegas, another theater operator opened a number of new theaters, and five years later owned more theaters than Syufy. Thus, "Syufy's acquisitions

did not short circuit the operation of the natural market forces. Las Vegas' first-run film market was more competitive when this case came to trial than before Syufy bought [the theaters]." Id. at 665.

The SDPUC has offered no proof that the Telephone Authority's acquisition of the Morristown, McIntosh and Timber Lake exchanges would result in an interminable monopoly. As evidenced by Syufy Enterprises, the fact that one company may be the sole provider of services in a specific geographic area does not preclude competition. "Obviously such acquisition will not produce the forbidden result [monopoly] if there be no pre-existing substantial competition to be affected . . . [and finding a monopoly would] be to apply the word 'competition' in a highly deceptive sense." International Shoe Co. v. Federal Trade Comm'n, 280 U.S. 291, 298 (1930). Thus, "the purchase of [one company's] capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser . . . is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce . . . ." Id. at 302-03. It is not the Telephone Authority's intent to lessen competition, but instead to insure that the subscribers in the Morristown, McIntosh and Timber Lake exchanges continue to receive state-of-the-art telecommunications services in light of U S WEST's decision that it no longer makes business sense to continue to provide services in those rural areas. The sales would not affect any preexisting competition. The SDPUC's characterization of the Telephone Authority as a monopolist is wrong.

Moreover,

> in a competitive market, buying out competitors is not merely permissible, it contributes to market stability and promotes the efficient allocation of resources. . . . For competitors in a free market to fear buying each other out lest they be hit with the expense and misery of an antitrust enforcement action amounts to a burden only slightly less palpable than a direct governmental prohibition against such a purchase.

Syufy Enterprises, 903 F.2d at 673. Yet, "direct governmental prohibition against such a purchase" is exactly what the SDPUC has accomplished here by refusing to approve the sales under its interpretation of SDCL § 49-31-59. Rather than promoting competition by approving the telephone exchange sales to the Telephone Authority, the only prospective purchaser in that rural section of South Dakota, the SDPUC has stifled it by adopting a cramped definition of the word "competition" that disregards settled case law and common sense.

3. The SDPUC's Prohibition of the Telephone Exchange Sales Directly Violates § 253(a).

In Public Utility Commission of Texas, the issue before the Commission was whether a 1995 Texas statute violated the terms of § 253(a), and if so, whether § 253(b) saved the statute's build-out requirement from preemption under § 253(d). A portion of the 1995 statute required holders of Certificates of Operating Authority ("COA") to "serve a specified portion of their service area using facilities that do not belong to the incumbent LEC." Id. ¶ 13. In other words, the statute required COA holders to construct their own facilities in an already-served build-out area of 27 square miles to accomplish the statutory service requirements. COA holders are distinguishable from holders of Service Provider Certificates of Operating Authority ("SPCOA"), who can "resell the services of an incumbent LEC." Id. ¶ 25. SPCOA holders do

not have to build-out their own facilities.

The Commission examined the statute according to the Communications Act:

> If we find that [the state law] violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b). If a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with section 253(d).

Id. ¶ 42. The Commission held that the state requirement violated § 253(a) because it, "expressly and directly restricts the ability of COA holders to provide service to end users by reselling incumbent LEC services or by using the unbundled network elements of an incumbent LEC to provide telecommunications services." Id. ¶ 77.

Like the Texas Public Utilities Commission, the SDPUC argues that if the Telephone Authority wishes to provide telecommunications services in the Morristown, McIntosh and Timber Lake exchanges, it can do so by constructing its own facilities duplicating the existing facilities that U S WEST currently owns and operates, reselling retail services using U S WEST's existing facilities, or by selling unbundled network elements. SDPUC Response at 13.[1] This does not answer whether the SDPUC has raised a barrier to entry prohibiting all Indian tribes and tribal

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[1]The SDPUC has mischaracterized the Joint Petition as an admission that the Telephone Authority "has not attempted to take advantage of these competitive provisions." SDPUC Response at 14 (citing *The Cheyenne River Sioux Tribe Telephone Authority's and U S West Communications, Inc.'s Joint Petition for Expedited Ruling Preempting South Dakota Law* at 15-16 (Jan. 22, 1998) ("Joint Petition")). The Telephone Authority and U S WEST emphasized in that passage of their Joint Petition that in order to provide services in the Morristown, McIntosh and Timber Lake exchanges in a manner that makes economic sense, it must purchase the exchanges and not duplicate infrastructure or resell U S WEST's retail services. Joint Petition at 15-16.

entities from purchasing telephone exchanges in South Dakota.

> Indeed, the Commission already has rejected a similar argument:
>
> we find that section 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e., new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options.

Public Utility Commission of Texas ¶ 74. See also id. ¶ 76. There is, then, no merit to the SDPUC's argument that the Telephone Authority may have other means available to provide services to the three telephone exchanges. SDPUC Response at 13. Under the SDPUC's application of SDCL § 49-31-59, the Telephone Authority is not free "to choose" how to provide services in those exchanges: the SDPUC has decreed that it may not purchase the exchanges. Even though the SDPUC implies that it would approve an application by the Telephone Authority to construct its own facilities, to use U S WEST's unbundled network elements, or to resell U S WEST's services, id., the SDPUC absolutely refused to approve the sale of the exchanges to the Telephone Authority. It is clear from the Commission's prior holdings that a state may not so limit a provider's ability to elect the manner of its entry into the telecommunications field. Public Utility Commission of Texas ¶ 74.

Moreover, requiring the Telephone Authority to build its own facilities, sell unbundled network elements, or resell U S WEST's retail services "would 'have the effect of prohibiting' [the Telephone Authority] from providing service contrary to section 253(a) due to the substantial financial investment involved . . . ." Id. ¶ 78. Indeed, "Congress expressly

recognized that construction of redundant networks would be very costly and time-consuming . . . ." Id. ¶ 78. Thus, like the Texas Public Utilities Commission, by denying the Telephone Authority the right to choose the form of its entry into the telecommunications field in the Morristown, McIntosh and Timber Lake telephone exchanges, the SDPUC has violated § 253(a).

B. SECTION 253(b) DOES NOT APPLY.

Nor does § 253(b) save the SDPUC's disparate application of SDCL § 49-31-59 to the Telephone Authority. The Communications Act provides that a state may "impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). The SDPUC strenuously argues its desire to protect the public interest, but such considerations are meaningless because it has not applied SDCL § 49-31-59 in a "competitively neutral" manner, nor has the SDPUC demonstrated that denial of the sales is "necessary" to protect the public interest.

1. The SDPUC Has Not Applied South Dakota Law in a Competitively Neutral Manner.

The first of the two required elements of § 253(b) is that the state must apply barriers to entry in a competitively neutral manner. In Public Utility Commission of Texas, the Texas commission applied its barrier to entry in a discriminatory fashion that did not save the state statute from preemption.

> The build-out requirements, however, are not neutral on their face -- they single out only COA holders and require them to construct

> their own facilities or purchase access to non-incumbent LEC network elements. SPCOA holders, however, are free to enter local markets through resale of incumbent LEC services without incurring these expenses. Further, by imposing the costs of providing facilities-based service only on COA holders, the build-out provisions significantly affect the ability of COA holders to compete against other certificated carriers for customers in the local exchange market.

Id. ¶ 82 (footnote omitted). See also id. ¶ 107 (also preempting statutory provision placing moratorium on granting of COA's as a barrier to entry, and also because it did not survive § 253(b) for failing to be necessary to achieve policy goals and to be competitively neutral).

The SDPUC has done the same thing here. It has prohibited the Telephone Authority from purchasing the Morristown, McIntosh and Timber Lake exchanges from U S WEST, requiring it to construct its own facilities, sell unbundled network elements or resell U S WEST's retail services. See SDPUC Response at 13. Meanwhile, the SDPUC permitted all but one other sale of telephone exchanges because it could regulate and tax the purchasers without running into problems of the effect of sovereign immunity.[2] Thus, while it allowed all other sales to go forward, showing deference to the free choice of the purchasers to exercise that option in order to enter the telecommunications market in the sold exchanges, it prohibited the Telephone Authority to freely choose the method by which it could provide such services in the Morristown, McIntosh and Timber Lake exchanges.

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[2]The SDPUC did not approve the sale of the Alcester Exchange to Beresford Municipal Telephone Company because under state law, a municipal telephone company may not own and operate an exchange that is outside municipality boundaries. See generally SDCL Ch. 9-41. The Alcester Exchange is located in the town of Alcester, not contiguous with the town of Beresford.

Like the Texas build-out requirement, the SDPUC's application of SDCL § 49-31-59 to prohibit the Telephone Authority -- and by necessary implication all Indian tribes and tribal entities -- from purchasing telephone exchanges constitutes a barrier to entry that the Commission should preempt. It is quite clear that the SDPUC has erected a barrier to entry for all Indian tribes and tribal entities seeking to purchase telephone exchanges in South Dakota. *The Cheyenne River Sioux Tribe Telephone Authority's and U S West Communications, Inc.'s Joint Petition for Expedited Ruling Preempting South Dakota Law* at 13-17 (Jan. 22, 1998) ("Joint Petition").

2. The Issue of State Versus Tribal Jurisdiction is Irrelevant to Whether the SDPUC's Denial of the Sales is Necessary to Protect the Public Interest.

Section 253(b) requires that in addition to demonstrating competitive neutrality, the state must also show that its barrier to entry is necessary to protect the public interest. The SDPUC argues that because it will lack regulatory authority after the sales of the Morristown, McIntosh and Timber Lake exchanges to the Telephone Authority, application of SDCL § 49-31-59 to deny the sales was in the public interest. See SDPUC Response at 17-18. This argument misses the point. The Joint Petition requests that the Commission preempt the SDPUC's application of state law to bar the sales of the three telephone exchanges, not examine the effects of the sales after their consummation. Indeed, § 253(a) requires only an examination of whether the SDPUC has erected a barrier to entry in the field of telecommunications in its application of SDCL § 49-31-59 to deny the sales. The Telephone Authority's and U S WEST's Joint Petition for preemption simply does not raise issues of state versus tribal jurisdiction.

a. The SDPUC Cannot Base its Barrier to Entry on Its Inability to Regulate.

The SDPUC's argument fails in the first instance because its regulatory oversight is not "'necessary' to achieve the public interest purposes listed in [§ 253(b)]." Public Utility Commission of Texas ¶ 83. The SDPUC has determined that the Telephone Authority is an eligible telecommunications carrier. *Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order*, Filing By Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier, No. TC97-184 (Dec. 17, 1997) (Joint Petition, Attachment 9). In that determination, the SDPUC specifically found that the Telephone Authority protects the public safety and welfare, id., Findings of Fact ¶¶ X, XX, and provides quality telecommunications services. Id., Findings of Fact ¶ XX, Conclusions of Law ¶ VI. The SDPUC therefore determined that the Telephone Authority was capable of advancing universal service and was entitled to eligible telecommunications carrier designation. Id., Conclusions of Law ¶ X. There is no dispute that the Telephone Authority has safeguarded the rights of its subscribers: since 1958, there have been few if any complaints regarding the Telephone Authority's service. Joint Petition at 5. The SDPUC's own findings and the undisputed record belie the claim that the barrier to entry it has erected is necessary to protect the public interest.

Indeed, the Commission rejected the argument the SDPUC advances here regarding its inability to regulate as being detrimental to the public interest. See SDPUC Response at 17. In New England Public Communications Council Petition for Preemption Pursuant to Section 253, CCBPol 96-11, FCC 96-470, 11 F.C.C.R. 19713 (1996), the

Connecticut Department of Public Utility Control argued that its prohibition against provision of pay telephone service by companies not providing local exchange service was justified under § 253(b) "to protect consumers from the abusive practices of independent payphone providers" that Connecticut could not regulate. Id. ¶ 15. The Commission rejected this argument: "we reject [Connecticut's] claim that its prohibition is defensible because it is a 'reasonable exercise of its explicitly reserved authority.'" Id. ¶ 21 (footnote omitted). It is clear that mere inability to regulate is not a valid basis under § 253(b) for erecting barriers to entry under the guise of being necessary to protect the public interest. See also Public Utility Commission of Texas ¶¶ 83, 84 (state build-out requirements were not necessary to protect the public interest because Congress did not include such requirements in the Communications Act, and the Texas Commission failed to demonstrate that the build-out requirements "are necessary to further universal service, promote high quality telecommunications services, and protect consumers . . . .").

b. In Any Event, Settled Law Permits State Regulation.

Despite the SDPUC's argument that it cannot regulate the Telephone Authority, SDPUC Response at 8, settled law holds that an Indian tribe's activities outside its reservation boundaries are subject to state regulation. Under the ruling of the Circuit Court, the continuing jurisdiction of the SDPUC over the operation of the Morristown, McIntosh and Timber Lake exchanges after the sales is undeniable. *Memorandum Decision* at 16-21, Cheyenne River Sioux Tribe Tel. Auth. v. Public Util. Comm'n of S.D., Civ. No. 95-288 (S.D. Cir. Ct. Feb. 21, 1997) ("Circuit Court Decision") (Joint Petition, Attachment 1). Activities on the Standing Rock Indian Reservation by the Telephone Authority are no different then any other

activity by the Telephone Authority outside the boundaries of the Cheyenne River Indian Reservation. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149 (1973). See also Circuit Court Decision at 15.

The Supreme Court has recognized that tribal sovereign immunity does not stand as a bar to collateral efforts by states to regulate transactions between Indian tribes and non-Indian consumers. In Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991), the Court held that the State of Oklahoma could tax the sale of cigarettes to non-Indians by a tribally owned convenience store and that the tribe could be required to assist in the collection of such taxes. Oklahoma complained that without a waiver of sovereign immunity it had "a right without any remedy." Id. at 514. The Court was not persuaded: "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives." Id. The Court mentioned the possibility of officer suits, actions against the wholesalers or "agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." Id.

It is clear that Supreme Court does not view sovereign immunity as a meaningful barrier to the assertion of legitimate state regulatory authority, even on the Reservation.[3] To be sure, the Telephone Authority would continue to possess tribal sovereign

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[3]We do not here distinguish between the on-Reservation and off-Reservation portions of the Timber Lake exchange since the SDPUC flatly denied all three sales without regard to exchange location. With respect to the on-Reservation portion of the Timber Lake exchange, Oklahoma Tax Comm'n provides that the SDPUC should devise adequate alternatives to enforce its regulatory authority. 498 U.S. at 514.

immunity, even for activities occurring off-reservation. See In re Greene, 980 F.2d 590, 596 (9th Cir. 1992) (sovereign immunity has an extra-territorial component) cert. denied, 510 U.S. 1039 (1994); Bank of Oklahoma v. Muscogee Nation, 972 F.2d 1166, 1170 (10th Cir. 1992) (sovereign immunity and comity bar federal court interpleader against tribe even when off-reservation banking activities involved). Nevertheless, the SDPUC will have "adequate alternatives" to ensure that it can satisfy its legitimate regulatory concerns. See Oklahoma Tax Comm'n, 498 U.S. at 514.

It is clear that regulatory jurisdiction is not an issue for the SDPUC, and that what the SDPUC's complaints boil down to is collection of taxes. Inability to collect taxes does not appear among the reasons enumerated in § 253(b) as a necessary-to-protect-the-public-interest justification for erecting a barrier to entry. Moreover, like state regulation, a state may also tax the off-reservation activities on an Indian tribe. In Mescalero Apache Tribe v. Jones, the Supreme Court held that New Mexico could apply its non-discriminatory gross receipts tax to an off-reservation tribal ski resort. 411 U.S. at 157-58. As the Court explained:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State. That principle is as relevant to a State's tax laws as it is to state criminal laws and applies as much to tribal ski resorts as it does to fishing enterprises.

Id. at 148-149 (citations omitted). Mescalero Apache Tribe shows that the SDPUC may tax the

Telephone Authority's activities outside the Cheyenne River Indian Reservation.[4] The SDPUC's lack of jurisdiction argument is a fiction.

Finally, to the extent the Telephone Authority's ownership and operation of the three telephone exchanges curtails state jurisdiction, such curtailment is by operation of the United States Constitution and federal law: the Telephone Authority shares in the characteristics of an Indian tribe. While the SDPUC may not appreciate the effect of tribal sovereignty and sovereign immunity on its regulatory authority, those principles have their origin in the United States Constitution and the United States Supreme Court has confirmed them time and time again. There is simply no basis for the SDPUC's conclusion that the allocation of jurisdiction and the immunity of Indian tribes from suit under federal law are not in the public interest. In the end, the SDPUC's concerns about protecting the public interest are baseless.

III. CONCLUSION

The SDPUC has attempted to obscure the issue before the Commission by claiming that the Communications Act requires the Commission to examine "barriers to competition" and monopolistic behavior. Nothing could be further from the truth. The issue here is whether the

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[4]Any problem associated with the collection of taxes on the portion of the Timber Lake exchange on the Cheyenne River Indian Reservation stems from the fact that under state law, the legal incidence of the current state tax falls on the Telephone Authority rather than the customers. See SDCL §§ 10-33-1, 10-33-21 (imposing a gross receipts tax on "each telephone company in this state."). The requirement in SDCL § 49-31-59 that payment of taxes is one of the factors that the SDPUC should consider should not stand as a barrier to the approval of the sale of the Timber Lake exchange when state law has created the problem and it is the state legislature's burden to fix it in the same fashion as it passed SDCL § 49-31-59. See Oklahoma Tax Comm'n, 498 U.S. at 514.

SDPUC's application of SDCL § 49-31-59 to deny the sales of the Morristown, McIntosh and Timber Lake telephone exchanges to the Telephone Authority constitutes a barrier to entry prohibited under § 253(a). That application constitutes a barrier to entry because no Indian tribe or tribal entity can ever purchase a telephone exchange in South Dakota due to the effects of sovereign immunity. The exclusion of the entire class of potential providers is a barrier to entry that the Commission should preempt pursuant to its authority in § 253(d).

Dated Mar 16, 1998

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I hereby certify that I have, this 16 day of March, 1998, hand-delivered a true copy of the foregoing, Joint Reply of the Cheyenne River Sioux Tribe Telephone Authority and U S WEST COMMUNICATIONS, INC. to the Comments of the South Dakota Public Utilities Commission Opposing the Joint Petition for Preemption, to the following:

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